INTRODUCTION

Standards of Review and Constitutional Analysis of Health Care Issues

By ROY G. SPECE, JR.*

Health care challenges the Constitution like few other interests. Health care is often as important as life itself, for without it one can be condemned to a life not worth living. Although it is not a constitutional entitlement, many consider it a unique good that should be available, at least in some form, regardless of socioeconomic standing.[1]

Health care is dispensed by an immense industry, one that represents approximately 17% of our gross domestic product and employs a substantial and growing portion of our work force. This industry has undergone one radical change after another. It is heavily and inconsistently regulated and is subsidized by various governmental entities. This state involvement is likely to increase—perhaps dramatically. The health care industry is full of internal tensions, conflicting expectations, and market failures. It is continuingly changed through the introduction of new techniques and technologies that may, at once, be expensive, useful, and harmful. These technologies can challenge and require rearticulation of some of our most basic concepts—life, death, parenthood, responsibility, liberty, and property.[2] In short, health care and biomedical technologies affect more people in deeper and elusive ways than perhaps any other processes. Little wonder, then, that health care challenges our fundamental law—the Constitution—as few other interests do.

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* Professor of Law, University of Arizona College of Law. J.D. 1972, University of Southern California; B.A. 1972, California State University, Long Beach.

1. *See generally* 1 & 2 PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SECURING ACCESS TO HEALTH CARE (1983).

2. MICHAEL H. SHAPIRO & ROY G. SPECE, JR., BIOETHICS AND LAW 18-20 (1981).

All proper constitutional analyses, especially those touching on health care, require certain explicit decisionmaking structures—usually described by the United States Supreme Court as "standards of review." Some constitutional scholars have declared that talk of such standards is naive, counter-productive, and misdescriptive of what the Court actually does.[3] The Court, however, continues ostensibly to rely upon standards of review. It is little surprise, therefore, that *all* the commentators in this symposium have arrayed their analyses and arguments around standards of review. That would be remarkable if standards of review were mere excrescences.

I

The Court fashions and abides by standards of review and ought to do so explicitly and rigorously. This is particularly important in an area such as health care, where basic interests and concepts clash and evolve in unpredictable and sometimes unknowable ways, and where the dynamics of a constantly changing industry involve the daily conduct of millions. In this context, unique cases will constantly arise. Stare decisis alone will not provide the requisites of a rule of law; new precedents must continuingly be fashioned. Analogies to prior cases will sometimes be useful, but other times will be strained or non-existent. Rather than create new basic law out of whole cloth to deal with unique cases individually, the Court must fashion and use standards of review to subject health care and other interests and industries to the rule of law.

Kathleen Sullivan's foreword to the Harvard Law Review's analysis of the Supreme Court's 1991 Term is devoted in substantial part to a discussion of the rule of law and the concepts of "rules" and "standards" as they apply to constitutional adjudication.[4] Although "standard of review" as used here is different from the "standards" discussed by Professor Sullivan (and by an entire body of literature on "rules" vs. "standards"), part of her discussion is a good starting point:

> Law translates background social policies or political principles such as a truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts. In a non-legal society, one might

3. *See, e.g.*, T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (decrying the pervasiveness of balancing in constitutional law, but not mentioning standards of review as a viable decisionmaking option); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

4. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

> apply these background policies or principles directly to a fact situation. But, in a society with laws, using the intermediary of legal directives is thought to make decisionmakers' lives easier, improve the quality of their decisions, or constrain their naked exercises of choice.
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> These mediating legal directives take different forms that vary in the relative discretion they afford the decisionmaker. These forms can be classified as either "rules" or "standards" to signify where they fall on the continuum of discretion. Rules, once formulated, afford decisionmakers less discretion than do standards.[5]

Sullivan goes on to explain the strengths and weaknesses of "rules" and "standards."[6]

Applying these concepts to constitutional law, Sullivan distinguishes between two approaches: categorization and balancing. Categorization (which is at the rules end of the continuum of discretion) is epitomized by the Court's two-tiered substantive due process and equal protection analysis. It is relatively predictable because it involves presumptions in favor of one-side or the other.[7] Balancing (which is at the standards end of the continuum) is represented by the "shock the conscience" test enunciated in *Rochin v. California*.[8] It is relatively unpredictable because it allows the decisionmaker to determine anew which facts are relevant and how they should be given operative significance.[9] Professor Sullivan imaginatively applies distinctions among rules, standards, categorization, and balancing to the Court's decisions in the 1991 term. She demonstrates that decisionmaking structures, whatever their content, influence the Court's deliberations.

I have summarized Professor Sullivan's provocative article in part because it is a good background to several propositions I have formulated for this piece.

Proposition One: Although a legal directive might constitute law, it is not consistent with "the rule of law" unless it is specific enough, along the continuum of rules and standards, to give reasonable notice of proscribed and prescribed conduct.[10] "Reasonable" notice is that

5. *Id.* at 57.
6. *Id.* at 62-69.
7. *Id.* at 59-62.
8. 342 U.S. 165 (1952).
9. Sullivan, *supra* note 4, at 61.
10. Concerning "the rule of law," see sources cited *id.* at 57 n.230. A legal directive can be invalid in one sense (e.g., be unconstitutional) but still have legal force (e.g., when one is prosecuted for violating an unconstitutional court order). *See* Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481 (1970).

considered adequate by informed observers who take due account of the particular functions of the legal directive and the social and institutional context within which it operates.

Proposition Two: "Standards of review" are those laws, rules, or decisionmaking structures the Court "creates" to translate the Constitution from a set of vague precepts into a rule of law. Implicit in this definition is the axiom that vague policies and political norms do not bridle governmental or judicial discretion sufficiently to be consistent with the rule of law; they allow rule by persons rather than by law. In other words, although many scholars and judges consider them fictions or worse, standards of review are essential to the rule of law. This is not to say that the Constitution does not conform with the rule of law. Rather, the structure created by the Constitution and the ideal of the rule of law inherent in the Constitution require the Court to translate the basic document's often vague text, history, and structure into rules.

Here these rules will be called "standards of review." The term can be used in two senses. The first, used here, encompasses: (1) rules about when the Court will exercise constitutional review at all; (2) rules directing what rule to select out of two or more potential rules regarding the degree of scrutiny the Court will exercise; and (3) the specific elements of various rules regarding the degree of scrutiny the Court will exercise. An example of (1) is the rule that one must establish a significant intrusion on a "life, liberty, or property" right to be entitled to due process protection. An example of (2) is the rule that the compelling state interest test will be used if one's fundamental right to liberty is intruded upon. An example of (3) is the compelling state interest test itself.

A second sense in which "standards of review" is used refers solely to the specific elements of rules regarding the degree of scrutiny the Court will exercise ((3) above). This is the sense in which courts and commentators usually use the term. This narrower sense of "standards of review" is consistent with the term's use outside of the constitutional context. For example, "standard of review" in civil procedure refers to the degree of scrutiny a reviewing court will apply (for example, the "clearly erroneous" standard for review of facts found by a trial court).

Properly conceived, constitutional standards of review, in both the broad sense used here and the narrower traditional sense, emanate from the text, structure, history, and values of the Constitution.

They both result from and implement evaluative processes, and they serve both heuristic and clarifying functions.

The rules the Court has fashioned can be better understood if one recognizes that they focus on five questions: (a) What state interests are relevant? (b) What state interests are weighty enough? (c) What relationship must exist between the state's actions, means, or classifications and its interests? (d) Will actions, means, or classifications that constitute less restrictive or more effective alternatives be required? and (e) What party must bear the "burdens of proof" (the burdens of producing evidence and of persuasion) regarding the above four questions?

Distinguishing among the various levels of analysis—(1) to (3) and (a) to (e) above—facilitates decisionmaking.

Proposition Three: Rules regarding when constitutional scrutiny will be ventured, what rules will be chosen, and the specific elements of rules should be designed, constantly molded, and judged by their ability to fulfill the following purposes: (1) to serve the values and interests embedded in the history, structure, and text of the Constitution; (2) to give notice of constitutionally proscribed or prescribed conduct to those addressed by the Constitution under various conditions; (3) to guide those subject to or benefitted by the Constitution in initiating, pleading, settling, and presenting cases; (4) to guide lower courts in deciding cases consonant with their duty to conform to rules established by the Supreme Court; (5) to guide or bridle the discretion of the Court by establishing certain rules of decisionmaking; (6) to limit—strictly, in certain cases—the degree of the Court's intervention into the political process; (7) to improve the "political process" (for example, by forcing the legislature to assert purposes for its actions, thus enhancing accountability); (8) to assist the Court in accurate and efficient decisionmaking; (9) to protect individual rights and to establish a rough preferential ordering of values under which certain rights will be given special protection; (10) to protect the Court from political limitation of its authority; (11) to make the Constitution understandable to non-lawyers; (12) to avoid making a complete cost-benefit analysis of actions subject to judicial review; and (13) to draw on the insights provided by significant theories of jurisprudential and constitutional interpretation.[11]

11. Consider, for example, the insights that might be provided by the "legal process," "law and economics," "theories of the good," and "perspectives of outsiders" approaches described in William W. Fisher III, *The Development of Modern American Legal Theory*

I have discussed most of these purposes elsewhere.[12] The majority are self-evident, but I will comment on the last three. First, as to (11), non-lawyers and most lawyers might not be able to understand judicial review based on a direct application of the philosophical principles articulated by John Rawls[13] or the economic precepts espoused by Richard Epstein.[14] They can grasp, however, the basic notions of "ordinary versus fundamental rights," "compelling state interests," "less restrictive alternatives," and "utterly irrational actions" that comprise most of the Court's substantive due process standards of review. Values associated with civic republicanism are fostered when the Court's rules are widely accessible.[15]

Second, as to (12), most persons would agree that the best way to make a decision is to weigh all costs and benefits of every option, considering all rights and duties, of course. The Court could review all governmental actions to see whether such a cost-benefit analysis was correctly done. But the Court is obviously not equipped to perform such a function in any significant number of cases. Even if it were, the outcome of such broad ranging review would be so indeterminate that none of the guidance functions of legal rules would be achieved. The very term "standard of review" connotes a continuum of possible levels of scrutiny, varying from the unlikely extreme of de novo review based on complete cost-benefit analysis to the other extreme of reviewing only totally irrational actions.

Third and finally, as to (13), our culture and history are too rich to bind our Constitution within one general theory. To do so would demoralize adherents to powerful schools of thought and ignore the insights and contributions of great minds. Standards of review can provide predictability, but they should spring from an eclectic jurisprudence that represents our diverse culture and history. For example, although it would likely be unwise to base the Constitution on one philosophical theory, certain philosophical principles might fill out rules or criteria concerning what constitute fundamental rights or compelling state interests.

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and the Judicial Interpretation of the Bill of Rights, *in* A CULTURE OF RIGHTS (Michael J. Lacey & Knud Haakonssen eds., 1991).

12. *See* Roy G. Spece, Jr., *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1289-1293 (1978).

13. JOHN RAWLS, A THEORY OF JUSTICE (1971).

14. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

15. David Schimmel, Book Review, 57 GEO. WASH. L. REV. 166, 172-73 (1988).

II

The debates and articles in this symposium each rely on standards of review: in substantive due process and equal protection, procedural due process, free exercise of religion, establishment of religion, takings, and "federalism." A brief review of the pieces shows how important, and sometimes problematic, standards of review are for the health care field.

In her article,[16] Professor Candice Hoke addresses Tenth Amendment and Spending Clause challenges to various health care reform proposals, including the Clinton Plan. She briefly traces the history of substantive principles of constitutional federalism. She explains that, although the Court has preserved vigorous procedural and judicial immunities, it has allowed protective substantive principles such as the intergovernmental immunity doctrine and the Tenth Amendment to atrophy. She sets forth the Court's deferential spending clause standard of review, which has remained unchanged for decades.

The same cannot be said of Tenth Amendment doctrine, the ebb and flow of which Professor Hoke traces from *National League of Cities v. Usery*[17] to *Garcia v. San Antonio Metropolitan Transit Authority*[18] to *New York v. United States*.[19] I will not assess the precise merits of Professor Hoke's analysis; that task is performed by others elsewhere in this symposium. However, she does demonstrate a reasoned approach to standards of review. She argues that *New York* sets forth an understandable and workable standard, supporting her argument by applying the standard to seven models of regulation she identifies among the Clinton and other health care reform proposals. Moreover, she understands that standards of review are not simply arbitrary guidelines picked at random so as to provide future guidance. Rather, they emanate from, and continuingly implement, the values underlying the Constitution.

The values Professor Hoke identifies as underlying the *New York* standard of review "are traceable to the more basic commitment of actualizing republican process values, whether they argue greater diversity of cultures, or greater innovation in government, or reduced threat of tyranny. This is the essential link between federalism and

16. Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994).

17. 426 U.S. 833 (1976).

18. 469 U.S. 528 (1985).

19. 112 S. Ct. 2408 (1992).

individual rights . . . ."[20] Professor Hoke convincingly demonstrates that national health care reform will probably impinge on federalism values. This is not surprising because health care consumes so much of our gross domestic product and is so important to individuals. Her analysis undermines a common view that has generally equated federalism concerns with hidden desires to subvert civil rights. Professor Hoke forcefully argues that individual rights cannot thrive in a system deprived of viable states.

Professor Thomas Merrill in his article[21] argues that physicians must be guaranteed a fair rate of return on their investment in human capital. Professor William Brewbaker's article[22] concludes, on the other hand, that price controls will be held constitutional unless they are so severe that they force physicians (or hospitals) to stop doing business.

Professor Merrill rests his analysis on the takings cases holding that public utilities must receive a fair rate of return on capital investments. This illustrates the importance of standards of review in the health care area. The health care industry has and is evolving in so many ways that there is no good case analogy within the takings area. Stare decisis is not sufficient. Arguing that each physician is a little public utility seems inappropriate. If there were sufficient standards of review in the takings area, new precedents could be properly generated from those standards. As Professor Brewbaker points out in his article, however, takings clause standards of review are in a state of disarray. Although the Court has developed certain per se tests that provide some guidance, one cannot predict when the Court will use which per se test or when it will resort to ad hoc balancing. Brewbaker also argues that physician price controls raise a question over unfair redistributions of wealth that ought to be decided under substantive due process and the rational basis test. This, in turn, suggests that the Court and commentators should develop coherence among substantive due process and regulatory takings standards of review.

The reader should note whether Professor Merrill gives sufficient attention to the particular right or degree of intrusion thereon that is necessary to support a regulatory takings claim. (Similar questions

20. Hoke, *supra* note 16, at 547.

21. Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L.Q. 635 (1994).

22. William S. Brewbaker III, *Health Care Price Controls and the Takings Clause*, 21 HASTINGS CONST. L.Q. 669 (1994).

arise concerning Merrill's related discussion concerning procedural due process.) It is reasonable to argue that the capacity for labor is "property," and courts have so held.[23] However, is it likely that courts will accept the notion that physicians' labor is unique because it represents an investment in human capital?

Professor Brewbaker raises the interesting point that it is not at all clear whether physicians can complain of any *net* disadvantage from government regulation of health care. He argues that only such a net disadvantage can support a constitutional claim. This raises questions that need further attention: Should the Court's takings and/or procedural due process rules only look to the net effect of governmental action to determine if there is a sufficient intrusion? If so, over what range of activities and what range of time?

Professor Ann Massie's article[24] analyzes the constitutionality of state laws that exempt parents from child abuse laws when they withhold medical care from their children on religious grounds. Massie concludes that: (1) parents' free exercise of religion and autonomy rights do not require the exemptions; (2) the exemptions violate the Establishment Clause; and (3) the exemptions violate childrens' rights to free exercise of religion and equal protection. I will only address (2).

In her discussion of accommodation of religion under the Establishment Clause, Professor Massie proposes a three-part test, modifying a test offered by Justice Brennan in one of his plurality opinions.[25] Professor Massie suggests that it can fill out the endorsement test and replace the *Lemon* test[26] in the context of religious exemptions from generally applicable laws. The test is:

> (1) the accommodation should lift a state-imposed burden from the religious actor; (2) the burden should pose a significant deterrent to the free exercise of religion (although the relief need not be *mandated* by the Free Exercise Clause for the accommodation to be valid); and (3) nonbeneficiaries should not be

23. *See, e.g.*, Jewell v. Maynard, 383 S.E.2d 536 (W. Va. 1989) (requiring attorney to devote more than 10% of his normal work year to court-appointed cases for extremely low compensation constituted a taking).

24. Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725 (1994).

25. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion).

26. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

> markedly burdened by the accommodation to the religious actor.[27]

Professor Massie then applies this modified test to exemptions from child abuse prosecution. She argues that exemptions meet the first two requirements of the test, but fail the third one because, from the perspective of secular society, exemptions markedly disadvantage a vulnerable class of third parties—children.

The test analyzed and applied by Massie seems to fulfill the guidance functions required by the rule of law and to accommodate properly the values at stake. The first requirement helps to prevent legislative overreaching to protect religiously motivated individuals or groups. The second requirement limits governmental overreaching in favor of religion by limiting intervention to cases in which free exercise values are significantly at risk. The third requirement encourages any exceptions to be closely tailored to alleviating free exercise burdens. These advantages square with the values inherent in the Establishment and Free Exercise Clauses. The requirements are relatively clear and can be manageably applied. Professor Massie's proposed test illustrates how standards of review both grow out of and implement the evaluative functions required by the Constitution.

In his article,[28] Professor Robert Sedler develops a position advanced in Michigan litigation by the ACLU that it is unconstitutional to deny competent, terminally ill individuals the use of physician-prescribed medications to hasten their deaths. He extends the same argument to persons who are so physically debilitated that they are in unendurable pain. He argues, however, that it is permissible for the government to prohibit assisted suicide on demand. In his article,[29] Thomas Marzen, General Counsel of the National Legal Center for the Medically Dependent and Disabled, counters, arguing that the state can constitutionally ban all assisted suicide.

Professor Sedler argues that the limited right to assisted suicide is analogous to the right to privacy or autonomy recognized in *Roe v. Wade*[30] and *Planned Parenthood v. Casey*.[31] Marzen counters that there is no liberty at issue in assisted suicide. *Roe* and *Casey* demon-

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27. Massie, *supra* note 24, at 766. Professor Massie argues that, although Justice Brennan apparently intended the first and third criteria to be disjunctive, they should be independent requirements. *Id.* at 766 n.221.

28. Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View From Without and Within*, 21 HASTINGS CONST. L.Q. 777 (1994).

29. Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799 (1994).

30. 410 U.S. 113 (1973).

31. 112 S. Ct. 2791 (1992) (plurality opinion).

strate, again, the inadequacy of stare decisis as the foundation for constitutional decisionmaking about health care. *Casey* purports to be consistent with *Roe*,[32] but nobody can discern precisely how this is the case, particularly concerning what constitutes a fundamental right and what standard of review should apply if there is a substantial intrusion on a fundamental right. Both involve a blend of bodily integrity and decisionmaking about reproduction, confounded by the termination of a living entity. Once again, generating sound decisions and guidance over a range of cases and a span of time requires better standards of review, including rules concerning the existence of "liberties" and the nature of ordinary versus fundamental rights. The Court has established various formulas for recognition of liberties, for example, "deeply rooted in our history and traditions"[33] and "implicit in the concept of ordered liberty."[34] As I have explained elsewhere, one can also discern several criteria that the Court and other authorities have considered relevant to determining whether a liberty is fundamental: importance to the constitutional scheme of social or political organization; importance to our concepts of personal liberty; historical establishment and recognition; non-economic basis; nexus to other fundamental rights; importance to individuals (for example, not having the right to obtain an abortion can shackle a woman with serious, lifetime burdens); claim against intervention rather than demand for subsidy; relative specificity within the text of the Constitution; and claim against paternalistic intervention.[35] One can search precedents that have recognized fundamental rights for these criteria. Then one can compare the number and degree of these factors involved in one's case to the presence and strength of the factors in the precedents. The reader should ask whether either Professor Sedler or Attorney Marzen correctly applies the precedents or the criteria that have been established concerning discernment of liberties and fundamental liberties.

Student note writer Jeanne Vance[36] analyzes the constitutionality of proposed laws that would pay women on welfare for beginning and continuing to use Norplant, a long-acting implantable contraceptive

32. *Id.* at 2804.

33. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

34. Palko v. Connecticut, 302 U.S. 319 (1937).

35. *See* Roy G. Spece, Jr., *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1062-73 (1979).

36. Jeanne L. Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 HASTINGS CONST. L.Q. 827 (1994).

agent. Vance applies the Court's established doctrine to the Norplant problem. She argues that such laws would violate substantive due process and equal protection. Under substantive due process, she argues that the Court should apply the compelling state interest test adopted in *Roe*, but that it might apply the undue burden test fashioned by the plurality in *Casey*. She duly notes the ambiguity and inadequacy of the undue burden test. Under equal protection, she argues that the Court should apply the intermediate scrutiny test adopted in *Craig v. Boren*,[37] but that it might apply the rational basis test used in the "real gender difference" cases.

Each of the articles in this symposium draws upon both precedents and standards of review. Their analyses demonstrate that standards of review are particularly necessary in a dynamic area such as health care, where yesterday's cases may offer little guidance by way of analogy. Some of the articles suggest refinements to improve existing standards. Courts and commentators should continue to attend to the development of standards of review that will assist us in bridling health care and biomedical technology within the purposes of the Constitution.

37. 429 U.S. 190 (1976).